90-1496

No. _____

FILED

MAR 20 1991

OFFICE OF THE CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1990

DONALD STEEG and IRENE STEEG,
his wife,

Petitioners,

v.

CITY of DEARBORN HEIGHTS,
JAMES R. BRIGGS,
and
LOUIS DOLLIAN

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

– AND APPENDICES –

William L. Fisher, Esq
Attorney for Petitioners,
Counsel of Record
Address:
2821 John R. Road
Rochester, Michigan 48307
(313) 852-8597

QUESTIONS PRESENTED

1.

In the instant case should the United States Supreme Court grant certiorari since plaintiffs:

a. are citizens of the United States as well as of Michigan;

b. pleaded and proved a federal civil rights violation for illegal deprivation of their vested right, to wit: to continue the residence use of their home as a residence;

c. obtained a jury verdict in the amount of $100,000.00 for compensatory damages for such civil rights deprivation;

d. were illegally deprived of their jury verdict by a judgment N.O.V. having no warrant in law; and

e. have as their last resort the United States Supreme Court for reinstatement of their jury verdict?

2.

Should the United States Supreme Court grant certiorari since plaintiffs:

a. pleaded and proved a federal constitutional violation for illegal seizure and demolition of their home (Count I) Inverse Condemnation;

b. were illegally prevented from obtaining a jury verdict for compensatory damages on (Count I) Inverse Condemnation and (Count II) Intentional Infliction of Emotional Injury Damages; and

c. are seeking reinstatement of their right to a jury trial on Inverse condemnation and Intentional Infliction of Emotional Injury Damages?

TABLE OF CONTENTS

Questions Presented i

Table of Contents iii

Table of Authorities v

Jury Verdict and Opinions Below 1

Jurisdiction 2

Constitutional, Statutory and
Ordinance Provisions 2

Statement of the Case 3

Reasons for Granting the Writ 6

Conclusion 9

Appendix A
Jury Verdict 12

Appendix B
Wayne County Circuit Court Opinion.. 14

Appendix B-1
Judgment N.O.V. 31

Appendix B-2
Judgment in Favor of Louis Dollian.. 33

Appendix B-3
Order Granting Directed Verdict
Count I 35

Appendix B-4
Order Granting Summary Judgment
Count II 37

Appendix C
Opinion Michigan Court of Appeals... 39

TABLE OF CONTENTS cont.

Appendix C-1
Order Michigan Court of Appeals..... 55

Appendix D
Order Michigan Supreme Court..... 56

Appendix E
42 USC 1983 57

Appendix F
5th Amendment 58

Appendix G
7th Amendment 59

Appendix H
14th Amendment 60

Appendix I
Original Complaint 61

TABLE OF AUTHORITIES

Cases	Page
Dusdal v City of Warren, 387 Mich 354	8
Federal Civil Rights Act 42 USC 1983	4
Federal Constitution,	
5th Amendment	8
7th Amendment	8
14th Amendment	8
Harrison v Springdale Water and Sewer Commission, 780 F2d 1422	7
Monroe v Pape 365 US 167; 81 S.Ct. 473; 5 L.Ed. 2d 492 (1961)	7
Mullane v Central Hanover Bank and Trust Co, 339 U.S. 306; 20 S.CT. 652; 94 (Ed 865)	8
Plunkett v Detroit Electric Railway Co., 140 Mich 299 (1905)	10

JURY VERDICT AND

OPINIONS BELOW

The Jury Verdict and Opinions of the State Courts (unreported) are set forth herein.

The Jury Verdict is contained in Appendix A.

The Opinion of the Wayne County Circuit Court dated October 2 1987 is contained in Appendix B. The Wayne County Circuit Court's Judgment N.O.V. (on Count III) is contained in Appendix B-1. The other orders of the Wayne County Circuit Court (on Counts I and II) are contained in Appendices B-2, B-3 and B-4.

The Opinion of the Michigan Court of Appeals (affirming the trial court's judgment N.O.V.) dated February 22, 1990 is contained in Appendix C. The Michigan Court of Appeals Order denying Motion for Rehearing dated April 24, 1990 is contained in Appendix C-1.

The Order of the Michigan Supreme Court dated December 26, 1990 is contained in Appendix D.

JURISDICTION

The statutory provision for this Court's jurisdiction is 28 USC 1257.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS

The Constitutional statutory and ordinance provisions involved in the case are as follows:

42 USC 1983, set forth in Appendix E.

5th Amendment, set forth in Appendix F.

7th Amendment, set forth in Appendix G.

14th Amendment Section 1, set forth in Appendix H.

City Ordinance 5.73 of defendant City as follows:

"Discontinuance or Abandonment

> Any non-conforming use of land or building which has become vacant or remains unoccupied owing to abandonment or discontinuance for a period of six (6) months shall thereafter conform to the provisions of this chapter."

STATEMENT OF THE CASE

Prior to September of 1981, plaintiffs were in the enjoyment of the residence use of their home as a residence. In September of 1981 defendant City provoked a vacancy in Steeg's residence by instigating the removal of Steeg's paying tenants and forced Steegs to make repairs to their thusly vacated home. In June of 1982, while Steegs were actually engaged in making such repairs to their home to satisfy the City's requirements for a certificate of occupancy, they were ordered to cease and desist by a uniformed officer of defendant City. He told Steegs that their home was "red-tagged" as authority to enforce his stop-work order. By this action defendant City effectively confiscated Steeg's home and later demolished same as their own structure.

Plaintiffs sued the City and two

officers of the City on three Counts: Count I Inverse Condemnation; Count II Intentional Infliction of Emotional Injury Damages; and Count III Deprivation of Plaintiffs Federal Civil Rights under 42 USC 1983. Plaintiffs original complaint is attached hereto as Appendix I. The trial court deprived plaintiffs of a trial under Counts I and II. A jury trial was held under Count III and plaintiffs recovered a jury verdict for compensatory damages of $100,000.00. The trial court entered a Judgment N.O.V. which was unwarranted in law. Nevertheless, same was affirmed by the Court of Appeals. The Michigan Supreme Court refused to review the decision of the Court of Appeals.

The federal question of deprivation of plaintiffs' civil rights under 42 USC 1983 was in the case from the beginning, having been pleaded in plaintiffs' Complaint as Count III (see Appendix I).

The federal question of inverse condemnation was likewise in the case from the beginning, having been pleaded in plaintiffs' Complaint as Count I.

The trial court found "facts" contrary to those found by the jury and granted a judgment N.O.V. based thereon. Among the "facts" found by the trial court was that Steegs' home was unrented for more than 6 months. The trial court equated this absence of tenants in Steegs' home with abandonment though the Ordinance itself requires 6 months of vacancy owing to abandonment.

The Court of Appeals affirmed the trial court's grant of a judgment N.O.V. by making a new and different finding of "facts" contrary to the jury's verdict.

The Michigan Supreme Court refused to review the decision of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

The United States Supreme Court is the Court of last resort to subserve justice for plaintiffs who have been deprived of their federal civil rights and their home by defendant City's unlawful application of Ordinance 5.73 thereto. Steeg's residence use of their home was a conforming use (in which case the Ordinance had no application thereto) nor was there any abandonment on the part of Steegs of their home (in which case the Ordinance still had no application thereto). The jury so found and awarded Steegs $100,000.00 in compensatory damages.

From the date of its stop-work order and the "red-tagging" of Steegs' home in June of 1982, defendant City effectively confiscated plaintiffs' home and its subsequent demolishment thereof was a demolishment of defendants City's own

structure. The City's application of Ordinance 5.73 to Steegs' home in June of 1982 in issuing a stop-work order and "red-tagging" same when Steegs were completing repairs thereto to obtain a certificate of occupancy was a per se violation of plaintiffs' federal civil rights. The City was guilty of malapplication of the Ordinance by declaring Steegs to have abandoned their home when they did no such thing. Steegs have forever lost their right to receive rent from a paying tenant and the right to continue their residence use of their home in violation of their federal rights as federal citizens. Monroe v Pape, 365 US 167; 81 S.Ct. 473; 5L.Ed. 2d 492 (1961); Harrison v Springdale Water and Sewer Commission, 780 F2d 1422. Defendant City's provoking of a vacancy in Steegs' home and the issuance of a stop-work order and the "red-tagging" of their home were

without warning to Steegs. A warning and opportunity to be heard is an absolute minimum for there to be due process. Mullane v Central Hanover Bank and Trust Co., 339 U.S. 306; 20 S.Ct. 652; 94 (Ed 865).

The trial court took plaintiffs' jury verdict away from them although it was supported by 43 USC 1983. Plaintiffs had a vested right to continue the residence use of their home even if it were a non-conforming use. 5th and 14th Amendment, Dusdal v City of Warren 387 Mich 354. The jury substituted such vested right of plaintiffs with a verdict of $100,000.00 compensatory damages which became a substitute vested right of plaintiffs of which they were illegally divested by the state courts. The jury has the sole function to adjudge the facts! The 7th Amendment so provides. In the instant case, the jury verdict can be supported as

a matter of law. 42 USC 1983 so provides.

Conclusion

The United States Supreme Court should grant certiorari and reinstate the jury's verdict (under Count III) awarding compensatory damages to Steegs under 42 USC 1983 for the defendant City's wrongful policy of deliberately ridding the City of non-conforming uses by malapplication of Ordinance number 5.73. Defendant City destroyed Steegs' home on the pretext of removing a non-conforming residence use thereof knowing there was no abandonment of their home on the part of Steegs.

The United States Supreme Court should also remand the case to the state courts for trial under Count I (Inverse Condemnation) as a further federal right of plaintiffs and under Count II (Intentional Infliction of Emotional Injury damages) as a pendant cause of action under state law.

How dare the state courts grant a judgment N.O.V. to deny Steegs the justice they deserve and had obtained from the jury for the malapplication of Ordinance Number 5.73 which resulted in the confiscation and demolishment of their home? The judgment N.O.V. (in violation both of the 7th Amendment and the principle of the Plunkett case cited below) is equivalent to denying Steegs their God-given Human Rights guaranteed to them as United States citizens.

The standard for reviewing a judgment N.O.V. is set forth in the Plunkett case as follows:

> "...we know of no case in which it is proper practice to enter a judgment non obstante verdicto unless it appears on the record that the verdict of the jury cannot be supported as a matter of law." Plunkett v Detroit Electric Railway Co. 140 Mich 299 (1905)

The only true and lawful judgment of the trial court was plaintiffs' jury

verdict since same was supported by law, to wit: 42 USC 1983. The trial court, in granting a judgment N.O.V., and the Court of Appeals, in affirming, effectively repealed 42 U.S.C. 1983 which is the support in law for plaintiffs' jury verdict. Both courts also effectively repealed the 7th Amendment by pretending to be empowered to examine facts already found by the jury.

Would that the United States Supreme Court use its good offices to issue a Writ of Certiorari to rectify this injustice to Steegs.

Respectfully submitted,

William L. Fisher
Attorney for Petitioners
2821 John R. Road
Rochester, Michigan 48307
(313) 852-8597

APPENDIX A

STEEG vs. CITY OF DEARBORN HEIGHTS

V E R D I C T F O R M

WE THE MEMBERS OF THE JURY FIND FOR THE DEFENDANTS AGAINST THE PLAINTIFFS FOR NO CAUSE OF ACTION.

_OR_

(YOU MAY FIND FOR THE PLAINTIFFS AGAINST ANY OR ALL OF THE DEFENDANTS AS FOLLOWS)

1. We find that the Plaintiffs' civil rights were violated and find that the total damages of the Plaintiffs were $100,000.00 dollars.

2. We the members of the jury find for the Plaintiffs against the City of Dearborn Heights:

   YES X NO _____

   We the members of the jury find for the Plaintiff against Louis Dollian:

   YES _____ NO X

   We the members of the jury find for

the Plaintiffs against James Briggs:

YES__X__ NO_____

The total amount of the damages is divided between the Defendants as follows:

CITY OF DEARBORN HEIGHTS: $ 50,000

LOUIS DOLLIAN: $ 0

JAMES BRIGGS: $ 50,000

THE TOTAL MUST BE EQUAL TO PARAGRAPH 1

APPENDIX B

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR

THE COUNTY OF WAYNE

No. 84 423 289 CZ

DONALD STEEG and

IRENE STEEG, his wife,

Plaintiffs,

-v-

CITY OF DEARBORN HEIGHTS,

JAMES R. BRIGGS and

LOUIS DOLLIAN,

Defendants,

OPINION

Plaintiffs herein commenced this action against the defendants, City of Dearborn Heights, James R. Briggs and Louis Dollian, for condemnation and violation of civil rights under 42 USC

1983. the condemnation claim was based on a theory of inverse condemnation.

At the conclusion of the plaintiffs' proofs, defendants moved for a directed verdict which the Court took under advisement. Subsequently, the Court granted the motion as to the condemnation claim. At the conclusion of all proofs, the defendants again moved for directed verdict in regard to the civil rights claim and, once more, the Court took the matter under advisement. The jury returned a verdict in the sum of One Hundred Thousand Dollars, finding the City of Dearborn Heights liable for Fifty Thousand Dollars and defendant, James R. Briggs, liable for Fifty Thousand Dollars. They returned a verdict of no liability on the part of defendant Louis Dollian.

This litigation evolves from the demolition of a residence owned by the plaintiffs. In the early 1960's

plaintiffs purchased property located at 4881 S. Beech Daly Road in the City of Dearborn Heights, Michigan. At that time, it was zoned residential but, subsequently, the zoning was changed to a C-1 which permits commercial use of the property. The plaintiffs, however, continued the residential use of the property as a non-conforming use in accordance with the zoning code.

In 1980, the plaintiffs moved and thereafter, rented the property to two separate tenants. In June of 1981, complaints were received regarding the use of this property. Defendant Ordinance Officer Louis Dollian made an investigation and determined that neither the tenant nor the owner of the property had obtained the certificate of occupancy required by the Dearborn Heights City Ordinance (Section 8.668). This section provides that any time a new tenant or

owner occupies a residential dwelling, a certificate of occupancy must be obtained prior to actually occupying the dwelling. A warning was issued to the then tenant, Steve Miller in June of 1981. Shortly thereafter, Mr. Steeg applied for a certificate of occupancy inspection.

Certificate of occupancy inspections were made by four separate inspectors and several serious problems were noted that needed to be remedied before a certificate of occupancy would be issued. Plaintiffs took no steps to make the needed repairs it being his contention he wanted to do so but did not have the necessary funds. In September of 1981, complaints were made to the City by area residents about a twenty-five to thirty foot trailer parked in the back of the yard as well as several small trailers and a boat. Plaintiff Donald Steeg was himself one of the complainants. On September 24, 1981, plaintiff Steeg

appeared at the 20th District Court regarding the previously issued ordinance violation, He was found guilty of not having a certificate of occupancy and fined Forth-Five Dollars and sentenced to the Detroit House of Correction. This sentence was suspended by the District Court on the condition that the house not be occupied without a certificate of occupancy. The occupants of the premises moved out shortly thereafter.

In December of 1981, complaints were received by the City regarding the house which was then unoccupied. In February of 1982, defendant James Briggs, Director of Building and Engineering of the City of Dearborn Heights, contacted plaintiff Irene Steeg by telephone informing her that a picture window had been broken and requested that the house be secured.

In September of 1982, the City determined that the house had been vacated

and vacant a period of time in excess of six months and further determined that the non-conforming use of the property as residential had been abandoned. At the plaintiffs' request, on October 13, 1982, Mr. Briggs prepared a statement setting forth use allowances for the property and zoning requirements and was informed by plaintiff Donald Steeg that he would pick it up personally. When he did not do so, Mr. Briggs mailed it out in a letter dated October 29, 1982.

Complaints continued to be received by the City relative to the condition of the house and also that boys were in it. Defendant contends requests were made of the plaintiffs to secure the property and that it boarded up the house when they failed to do so. Approximately eight months after being informed by the City that he had abandoned his non-conforming use of the property, plaintiff Donald

Steeg applied to the Zoning Board of Appeals for a use variance to allow continuance of the residential use. A hearing was held on May 5, 1983 and the appeal was denied by the Board. No appeal to the Circuit Court was taken from this denial.

In May of 1983, there was a fire at the house which defendants claim caused serious damage. A notice was sent to the plaintiffs informing them of proposed demolition and the process for appealing such order of demolition. On July 11, 1983, plaintiff Donald Steeg requested a hearing before the Demolition Board of Appeals and paid for the appeal. On July 13, 1983, plaintiff Donald Steeg was notified of the date of the Demolition Board of Appeals hearing which was scheduled for July 28, 1983. However, sometime prior to the hearing, plaintiff Donald Steeg informed defendant Briggs by

phone that he did not wish to have a hearing and withdrew his application. Thereafter, the appeal hearing was canceled and, after making formal application for refund of the hearing fee to the City Comptroller, plaintiff received a refund check on August 26, 1983.

Thereafter, the City proceeded with the necessary steps to demolish the building and on October 31, 1983, a compilation of bids for demolishing the building were sent to the City Council. On November 4, 1983, a letter was sent to the attorney for Donald Steeg regarding the pending demolition and Mr. Steeg was provided with a copy of the letter to his attorney. They were informed that the City intended to complete the demolition but that it would not take place for two and a half weeks. On November 9, 1983, the building was demolished. Plaintiffs

did not appeal the condemnation to the Demolition Board of Appeals nor take any Circuit Court action seeking to restrain the City from demolishing the Building.

The aims of the Civil Rights Act are succinctly set forth in Monroe v Pape, 365 US 167; 81 S.Ct. 473; 5 L. Ed. 2d 492 (1961) wherein the Court observed:

> ***"The Supreme Court found that Congress had three principal aims in enacting the 1871 civil rights act which is now 42 U.S.C. 1983: (1) to override 'invidious legislation' by the states which impaired rights and privileges of citizens of the United States; (2) to provide a remedy for infringment of such rights and privileges where state law was inadequate; and (3) to provide a federal remedy where a state remedy was adequate in theory but not in actual practice. Id. at 173-74, 81 S.Ct. at 476-77.
>
> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and

> immunities guaranteed by the fourteenth Amendment might be denied by the state agencies."

In Parratt v Taylor, 451 US 527, 101 S.Ct. 1908, 68 L. Ed. 2nd 420 (1981), cited by defendant, an action was brought by a prison inmate under 42 USC 1983 for certain hobby materials valued at $23.50 which were lost after delivery to the prison. Since normal procedures were not followed, the inmate claimed his property was negligently lost and that he had been deprived of his property without due process in violation of his rights under the Fourteenth Amendment. The court therein recognized that generally before one can be deprived of his property, a predeprivation notice and hearing must be held where the taking is under color of state law. However, it held that when the deprivation results from "random or unauthorized" acts the availability of meaningful postdeprivation procedures

satisfies the requirements of procedural due process. The court reasoned that where the loss is not a result of some established state procedure, the State can not predict precisely when it will occur and, hence, it would be difficult to conceive how the State could provide a meaningful hearing before the deprivation took place.

Plaintiffs submit that not only has the Parratt decision been criticized[1/] but it is inapplicable since the acts complained of in the instant case were not "random and unauthorized" and, consequently, a predeprivation notice and hearing was required. In this, the Court agrees. An examination of the events in this case, however, indicates that

---

1/ Plaintiffs have referred the court to a 1986 Columbia Law Review article written by Henry Paul Monaghan entitled "State Law Wrongs, State Law Remedies, and the Fourteenth Amendment."

plaintiffs were afforded adequate predeprivation notice and hearing and that the fundamental requirements of due process for the opportunity to be heard at a meaningful time and a meaningful manner before a state may finally deprive a person of his property interest was met.

First of all, they had an adequate hearing on the certificate of occupancy violation. A warning had been issued and neither the tenant nor the plaintiffs made any attempt to obtain the certificate of occupancy. Subsequently, a ticket was issued and time was given for the plaintiffs to arrange for the necessary inspections and repairs. they failed to do this which finally resulted in Mr. Steeg's conviction in the District Court in which no appeal was taken.

Subsequent thereto, the tenant left the premises and the property remained vacant and unoccupied for over a year.

Under the Dearborn Heights City ordinance 5.73,[2/] property that had been vacant for over six months was considered to be an abandonment of a non-conforming use. Some eight months after being informed that the City had determined they had abandonment of a non-conforming use, plaintiffs then applied to the Zoning Board of Appeals for a use variance to allow its continuance as a residential use. At this proceeding, the plaintiffs had an opportunity to present evidence to the Zoning Board of Appeals which ultimately denied the use variance. This decision was never appealed to the Circuit Court although there are provisions for such procedures. Finally, in May of 1983, a fire occurred and the City alleged extensive damage was

---

2/ In their briefs, plaintiffs have indicated the ordinance is invalid but no authority or argument for this conclusion. Suffice it to say, the Court find this claim to be without merit.

done which resulted in defendant Briggs preparing papers for notice of condemnation in order to abate a nuisance. This notice was sent by registered mail to the plaintiffs and a receipt therefore was signed by plaintiff Irene Steeg. This notice indicated the procedure for appealing the demolition process and that a demolition hearing is heard before the Demolition Board of Appeals. Plaintiff Donald Steeg requested such hearing and paid the fees for same. A hearing was scheduled for July 28, 1983 but prior thereto he withdrew his application for the hearing. Upon application to the City Comptroller for refund, a check was issued to him for the fee on August 26, 1983. Thereafter, the City proceeded with the necessary steps to demolish the building although in November of 1983 it sent still another letter to plaintiffs' attorney with a copy to the plaintiffs indicating

that demolition would not take place for at least two-and-a-half weeks. No action was taken by the plaintiffs and on or about December 9, 1983, the building was demolished.

In view of the foregoing interactions between the plaintiffs and the defendant, the various hearings afforded to them and the opportunities they had to appeal any adverse determinations and, finally, considering that plaintiff Donald Steeg withdrew his request for a hearing on the demolition, this Court can not find there was any deprivation of procedural due process. While plaintiffs may now claim they had no intention of abandoning the property, the fact of the matter is it did lay vacant in a state of disrepair for lengthy periods of time despite the numerous notices to them. Had, in fact, they felt there had been no abandonment for the reasons suggested in their brief

i.e. no intent to abandon, payment of a mortgage, periodic entrance into the house to make repairs, they could have challenged the City's abandonment claim in court action as is typified by the case of Dusdal v City of Warren, 387 Mich 354 cited in their brief. Plaintiffs also argue defendant had the obligation to give them notice the non-conforming use had been or would be abandoned if the property was vacant or vacated for six months. No authority is cited to support this contention nor do they suggest how a city is to either be aware of the conditions which are developing into a state of abandonment nor how notice is to be given to the affected party. The Court finds the ordinance itself is notice and the defendant was under no obligation to go through the city to ferret out those who were in danger of losing a non-conforming use. Indeed, it can not imagine how this

could be feasibly done. Further, as previously noted, the plaintiffs were not without a remedy or an opportunity to challenge the defendant's determination that the non-conforming use had been abandoned.

For the reasons stated herein, the Court concludes that the plaintiffs do not have a viable cause of action under 42 USC 1983. Accordingly, the motion for directed verdict is granted and, it follows that the jury verdict must be set aside. An order in accordance with this opinion may be entered forthwith.

s/ROLAND I. OLZARK

Circuit Judge

Dated: October 2, 1987

APPENDIX B-1

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

DONALD STEEG and IRENE STEEG,
his wife,

Plaintiffs,

C/A No. 84 423289 CZ

vs.

HON. ROLAND OLZARK

CITY OF DEARBORN HEIGHTS,
JAMES R. BRIGGS, and LOUIS
DOLLIAN,

Defendants.
_____/

JUDGMENT NOTWITHSTANDING THE VERDICT
IN FAVOR OF CITY OF DEARBORN HEIGHTS AND
JAMES R. BRIGGS AS TO COUNT III

At a session of said Court, held
in the City of Detroit, County of
Wayne, State of Michigan
on Feb 19 1988

PRESENT: HON. ROLAND L. OLZARK
JUDGE

On motion of the Defendants, CITY OF DEARBORN HEIGHTS and JAMES R. BRIGGS, at the conclusion of Plaintiffs' proofs and at the conclusion of all proofs for a directed verdict as to Count III, the federal civil rights claim, and the Court having taken the matter under advisement,

and the jury having returned a verdict in favor of the Plaintiffs and against the Defendant, CITY OF DEARBORN HEIGHTS in the amount of $50,000.00 as to Count III and in favor of Plaintiffs and against the Defendant JAMES R. BRIGGS in an amount of $50,000.00 as to Count III and the Court having issued an Opinion dated October 2, 1987, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED that the jury verdict against the CITY OF DEARBORN HEIGHTS and JAMES R. BRIGGS as to Count III be set aside and a judgment notwithstanding the verdict of no cause of action be entered in favor of the Defendants, CITY OF DEARBORN HEIGHTS and JAMES R. BRIGGS, and against the Plaintiffs, DONALD and IRENE STEEG as to Count III for the reasons stated in the Court's Opinion dated October 2, 1987.

Roland L. Olzark
CIRCUIT COURT JUDGE

APPENDIX B-2

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

DONALD STEEG and IRENE STEEG, his wife,

Plaintiffs,

C/A No. 84 423289 CZ

vs.

HON. ROLAND OLZARK

CITY OF DEARBORN HEIGHTS, JAMES R. BRIGGS, and LOUIS DOLLIAN,

Defendants.
_____/

JUDGMENT OF THE JURY'S VERDICT IN FAVOR OF LOUIS DOLLIAN AS TO COUNT III

At a session of said Court, held in the City of Detroit, County of Wayne, State of Michigan on Feb 19 1988

PRESENT: HON. ROLAND L. OLZARK
JUDGE

Upon motion for the Defendant, LOUIS DOLLIAN, at the conclusion of Plaintiffs' proofs and at the conclusion of all proofs on Count III, the federal civil rights claim, and the Court having taken the matter under advisement, and the jury rendering its verdict of no cause of

action against the Defendant LOUIS DOLLIAN as to Count III, and the Court issuing an Opinion dated October 2, 1987, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED that a judgment on the jury verdict, of no cause of action on Count III in favor of the Defendant, LOUIS DOLLIAN, and against the Plaintiffs DONALD and IRENE STEEG, is hereby entered.

Roland L. Olzark
CIRCUIT COURT JUDGE

APPENDIX B-3

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

DONALD STEEG and IRENE STEEG, his wife,

Plaintiffs,

C/A No. 84 423289 CZ

vs.

HON. ROLAND OLZARK

CITY OF DEARBORN HEIGHTS, JAMES R. BRIGGS, and LOUIS DOLLIAN,

Defendants.
_____/

ORDER GRANTING DIRECTED VERDICT AS TO COUNT I

At a session of said Court, held in the City of Detroit, County of Wayne, State of Michigan on Feb 19 1988

PRESENT: HON. ROLAND L. OLZARK
JUDGE

Upon motion of the Defendants, CITY OF DEARBORN HEIGHTS, JAMES R. BRIGGS and LOUIS DOLLIAN, at the conclusion of Plaintiffs' proofs and at the conclusion of all proofs for a directed verdict on Count I, of the condemnation claim, and the Court being fully advised in the

premises;

IT IS HEREBY ORDERED that the Defendants' Motion for Directed Verdict is granted and a judgment of no cause for action in favor of the Defendants is hereby entered on Count I, the condemnation claim.

Roland L. Olzark
CIRCUIT COURT JUDGE

APPENDIX B-4

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

DONALD STEEG and IRENE STEEG, his wife,

Plaintiffs,

C/A No. 84 423289 CZ

vs.

HON. ROLAND OLZARK

CITY OF DEARBORN HEIGHTS, JAMES R. BRIGGS, and LOUIS DOLLIAN,

Defendants.
_____/

ORDER GRANTING SUMMARY JUDGMENT
AS TO COUNT II

At a session of said Court, held in the City of Detroit, County of Wayne, State of Michigan on Feb 19 1988

PRESENT: HON. ROLAND L. OLZARK
JUDGE

Upon motion of the Defendants, CITY OF DEARBORN HEIGHTS, JAMES R. BRIGGS and LOUIS DOLLIAN, for Summary Judgment as to Count II, Plaintiffs' claim of Intentional Infliction of Emotional Distress, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED that Defendants'

Motion for Summary Judgment is granted and a judgment of no cause for action in favor of the Defendants is hereby entered on Count II, the Intentional Infliction of Emotional Distress claim.

Roland L. Olzark
CIRCUIT COURT JUDGE

APPENDIX C

STATE OF MICHIGAN

COURT OF APPEALS

No. 107265

Before: Sullivan, P.J., and doctoroff and Reilly, JJ.

PER CURIAM.

Plaintiffs appeal as of right the February 19, 1988, judgment of the Wayne Circuit Court granting summary disposition on their claim of intentional infliction of emotional distress and granting judgment notwithstanding the jury's $50,000.00 verdict on their federal civil rights claim. Plaintiffs also appeal the trial court's directed verdict for defendant based on the alleged inverse condemnation of plaintiffs' property at 4881 Beech Daly Road in Dearborn Heights.

The property had been used as income producing rental property. We affirm.

Plaintiff Donald Steeg purchased the home in 1964. Although the area had shown a gradual change to commercial from 1964 through 1980, plaintiffs did not know until 1981 that the area was zoned C 1 (light commercial). Plaintiffs did not know until June, 1982, that the home was a nonconforming use.

On June 19, 1981, plaintiffs received a citation for failure to have a certificate of occupancy. At plaintiffs' request, the city then inspected the house and notified plaintiffs what needed to be done to bring the house up to code in order to obtain a certificate. Plaintiffs obtained a permit for the plumbing work which they could do themselves, but they did not obtain permits for heating, electrical or building repair work. On September 23, 1981, plaintiffs signed a

complaint for blight against the property because their tenant had four or five trailers parked in the backyard. On September 24, 1981, based on the citation issued June 19, 1981, the district court convicted plaintiffs for failure to have a certificate of occupancy and ordered the eviction of their tenant. Plaintiffs did not complete the required repairs for the certificate of occupancy and did not request the city to reinspect the house.

In June, 1982, while plaintiffs were working on the house, defendant Dollian, the city's ordinance officer, gave plaintiffs a stop work order and "red tagged" the house. Plaintiffs were unaware that the city code provided that they had six months to obtain the certificate of occupancy or they would lose their nonconforming use. On October 13, 1982, defendant Briggs, the city's director of buildings and engineering

department, sent plaintiffs a letter informing then that they had lost their nonconforming use, but that the building could still be used as a business use consistent with the C-1 zoning. However, plaintiffs did not want to use the house as a commercial unit. In November, 1982, plaintiffs received a notice that the building was open and unsecured. The house began to deteriorate after 1982 due to vandalism.

In April, 1983, plaintiffs appeared before the zoning board of appeals and requested a variance for six months in order to bring the house up to code so they could obtain a certificate of occupancy and use the home as a residence again. A simple majority of the board supported plaintiffs, but they needed a two-thirds majority. they never appealed that decision. At about the same time, the home was extensively damaged due to a

fire. Plaintiffs did not have the financial capacity to repair the damage. On June 29, 1983, the city issued a condemnation notice. Plaintiffs initially appealed but, prior to the hearing, dropped the appeal when they realized they would not be able to repair the home and use it as a residential property because of the nonconforming use. Ultimately, the house was demolished and the cost of demolition was added to the tax roll. Plaintiffs still had title to the realty at the time of trial.

James Briggs testified that, as director of buildings and engineering department, the Beech Daly Revitalization project. While the city has a code provision to purchase nonconforming uses, it has never used it because it has never had any money to do so. Additionally, while the code provides that an owner of a nonconforming use must apply for a

certificate of occupancy within 30 days of receipt of a notice or lose the nonconforming use, the provision is not stringently enforced. Instead, the city uses Ordinance 573 which provides that if any use of nonconforming land or building becomes vacant or unoccupied or abandoned for a period of six months, the nonconforming use is lost. Briggs admitted that the violations discovered in the 1981 inspection were minor, but added that they were never corrected. The building department did not inform plaintiffs that they had six months to obtain the certificate or they would lose the nonconforming use. It is not the city's plan to demolish houses to revitalize the area. In fact, the department was very lenient in the period from 1981 through 1983 because homes were hard to sell and mortgages were difficult to obtain. The house was not condemned

until after the fire and plaintiffs withdrew the appeal of the condemnation which they had filed.

Plaintiffs first claim that the trial court erred in granting judgment notwithstanding the verdict on their 42 USC 1983 claim because their property was taken without due process of law. We disagree.

On reviewing the grant of a judgment notwithstanding the verdict, this court views the facts and all legitimate inferences that may be drawn therefrom in a light most favorable to the party opposing the motion. Troyanowski v Kent City, 175 Mich App 217, 223-224; 437 NW2d 266 (1988). If, when the evidence is so viewed, reasonable men could honestly reach different conclusions, then the request for a judgment notwithstanding the verdict is properly denied. Id.

The Civil Rights Act, 42 USC 1983,

provides a civil remedy to persons deprived of constitutional rights by individuals acting under color of state law. Electro-tech v Campbell Co, 433 Mich 57, 65-66; ___ NW2d ___ (1989). The two essential elements to a 1983 action are (1) whether the conduct complained of was committed by a person acting under color of state law, and (2) whether this conduct deprived a person of rights, privileges or immunity secured by the constitution or laws of the United States. Id., pp 66-67. The due process clause of the Fourteenth Amendment affords not only procedural safeguards to protect a life, liberty, and property interest, but it also protects substantive aspects of those interests against impermissible government restrictions. Id., n. 9.

In this case, because the city and its officers were acting in their official capacities, the action clearly arises

"under color of state law." The query is whether plaintiffs were denied a right, privilege or immunity secured by the United States Constitution or laws. Plaintiffs do not challenge the constitutionality of the city's ordinances. Instead, they limit their appeal on this issue to a procedural due process violation.

Viewed in a light most favorable to plaintiffs, the evidence does not support a deprivation of plaintiffs' procedural due process. Plaintiffs knew they had to have a certificate of occupancy but never completed the repairs necessary to obtain it. While the record shows they were unaware that they would lose the nonconforming use if the building remained vacant for six months, the lower court's determination that the ordinance itself constituted notice was not erroneous. Everyone is presumed to know the law.

Grand Rapids Independent Publishing Co. v City of Grand Rapids, 335 Mich 620, 630; 56 NW2d 403 (1953). A year after being cited for not having a certificate of occupancy, plaintiffs were working on the home without the necessary repair permits when the city issued its stop-work order. In September, 1982, the city deemed the home abandoned and determined that the nonconforming use had been lost. Prior to that, in December, 1981, complaints had been received that the building was not secured and children were playing in it. It was not until eight months after being notified of the loss of the nonconforming use that plaintiffs went before the zoning board of appeals to attempt to obtain a variance. When the zoning board denied the variance, they did not file an appeal to the circuit court. After the 1983 fire, the city sent plaintiffs a condemnation notice which informed them of

the appeal procedures. While they initially appealed, prior to the hearing, they withdrew their request. After the demolition was scheduled, in November, 1983, plaintiffs and their attorney both received a letter informing them of the procedure to halt the demolition. Again, plaintiffs did nothing, choosing instead to acquiesce in the demolition and to file this lawsuit in July, 1984.

Plaintiffs next claim that the trial court erred in granting a directed verdict on their inverse condemnation claim. Again we disagree.

the standard of review for a directed verdict is the same as that for a judgment Notwithstanding the verdict. Feaheny v Caldwell, 175 Mich App 291, 299; 437 NW2d 358 (1989).

We note initially that plaintiffs were not required to seek a variance or to appeal the zoning board's decision as a

prerequisite to their complaint. The taking claim is separate from the seeking of a variance. Bevan v Brandon Twp, 176 Mich App 452, 457; 440 NW2d 31 (1989).

Under Michigan law, a taking for purposes of inverse condemnation means that governmental action has permanently deprived the property owner of any possession or use of the property. Electro-tech, supra, p 89. Michigan law also recognizes a cause of action for inverse condemnation in cases without a physical taking of property where it is alleged that the effect of a governmental regulation is to prevent the use of much of plaintiff's property for any profitable purpose. Id.

In this case, plaintiffs, who still owned the realty at the time of trial, assert that their house was taken by the city in June, 1982, when it was red tagged with a stop-work order to cease all

repairs. they contend that the stop-work order prevented them from converting the house into a conforming use, such as an office or store. However, the stop-work order was issued because plaintiffs did not have the necessary permits. Further, plaintiffs knew that they could convert the building into a business use consistent with C-1 zoning, but did not want to use the house as a commercial building. As a matter of law, the events that plaintiffs complain of in this case are not taking. It is clear that, in order to sustain a taking attack on a zoning ordinance, an aggrieved property owner must show that if the ordinance is enforced the consequent restrictions on his property preclude its use for any purposes to which it is reasonably adapted. Electro-tech, Supra; bevan, supra, p 461. Here, plaintiffs simply chose not to use the property for a

commercial purpose. There is no error.

Finally, we conclude that the trial court did not err in granting summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. Dumas v Auto Club Ins Assn, 168 Mich App 619, 626; 425 NW2d 480 (1988). Summary disposition is appropriate if the court determines on the basis of the record that it is impossible for the claim asserted to be supported by evidence at trial. Peterfish v Frantz, 168 Mich App 43, 48-49; 424 NW2d 25 (1988).

In Roberts v Auto Owners Ins Co, 422 Mich 594; 374 NW2d 905 (1985), the Supreme Court declined to decide whether Michigan recognizes a cause of action for intentional infliction of emotional distress. However, this Court has recognized the tort. Grochowalski v DAIIE, 171 Mich 771, 775; 430 NW2d 822 (1988), lvden 432 Mich 929 (1989). The

tort is defined by referring to 1 Restatement torts, 2d, 46, pp 71-72, wherein the elements are stated as follows: (1) extreme or outrageous conduct, (2) which intentionally or recklessly, (3) causes (4) extreme emotional distress. Id. Extreme or outrageous conduct so outrageous in character and so extreme in degree that it goes beyond all possible bounds of decency and is regarded as atrocious and utterly intolerable in a civilized community. Grochowalski, supra, pp 775-776.

In this case, we find that the facts do not support plaintiffs' claim and the proofs are not such as to lead an average member of the community to consider the actions of defendants as outrageous. Plaintiffs' allegations simply do not fit within that narrow line of cases where a defendant's behavior was so egregious as to present a jury submissible issue.

Affirmed.

s/Joseph B. Sullivan

s/Martin M. Doctoroff

s/Maureen Pulte Reilly

APPENDIX C-1

COURT OF APPEALS,

STATE OF MICHIGAN

ORDER

Donald Steeg v City of Dearborn Heights

Docket # 107265

L.C.# 84 423289 CZ

Joseph B. Sullivan
Presiding Judge

Martin M. Doctoroff
Maureen Pulte Reilly
Judges

The Court orders that the motion for rehearing is DENIED.

A true copy entered and certified by Norbert G. Jaworski, Chief Clerk on

April 24, 1990
Date

Norbert G. Jaworski
Chief Clerk

APPENDIX D

MICHIGAN SUPREME COURT

Order

Entered: December 26, 1990

89001

89001(61) & (62)

DONALD STEEG and IRENE STEEG,
his wife,

Plaintiffs-Appellants
Cross-Appellees,

v

SC: 89001
COA: 107265
LC: 84-423289 CZ

CITY OF DEARBORN HEIGHTS,
JAMES R. BRIGGS and
LOUIS DOLLION,

Defendants-Appellees
Cross-Appellants.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. The application for leave to appeal as cross-appellant and the motion to dismiss the same are therefore moot and are DENIED.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.
December 26, 1990 Corbin R. Davis

APPENDIX E

42 USC 1983 provides:

"Every person who, under color of any statue, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

APPENDIX F

5th Amendment

of the

Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX G

7th Amendment

of the

Constitution of the United States

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

APPENDIX H

14th Amendment

of the

Constitution of the United States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX A

STATE OF MICHIGAN

IN THE CIRCUIT COURT

FOR THE COUNTY OF WAYNE

Donald Steeg and Irene Steeg,
his wife

Plaintiffs

v

City of Dearborn Heights,
James R. Briggs and
Louis Dollian

Defendants /

COMPLAINT

Now come plaintiffs, by their attorney, and for a cause of action against defendants show unto the court as follows:

COUNT I

1. This court has jurisdiction by reason of all parties residing in and/or being established in said county; by the amount in controversy exceeding $10,000.00

and/or by involving real property situate in said county.

2. Plaintiffs are owners of real property and a home thereon in said county at 4881 Beech Daly Rd. in the city of Dearborn Heights described as follows:

> Lots 503,504 and 505, Rougelvania Sub. No. 2 of part of west ½ of southwest ¼ of section 32, town 2 south, range 10 east Dearborn Township, Wayne County, Michigan as recorded in liber 55, page 33 Wayne County records.

3. Plaintiffs have been deprived by defendants of a right, privilege or immunity secured by the 14th Amendment of the U.S. Constitution and comparable provisions of the Michigan Constitution to wit: a property right in real property and home including the right not to have said property taken for a public purpose without due process of law including payment of just compensation therefor.

4. By malfeasance, misfeasance and/or nonfeasance, defendants have

maliciously, deliberately, intentionally, recklessly and carelessly deprived plaintiffs of their property including a beautiful home (as shown in Exhibit A attached) by their wrongful actions including wrongful use of zoning regulations and building inspections and spying on plaintiffs' home and interfering with plaintiffs' use and upkeep of their home and their lease of said home including harassing plaintiffs and causing their home to be vacated and then declaring same to be abandoned and then destroying said home and adding all manner of illegal cost and expenses to the tax rolls of said property.

5. Plaintiffs have each suffered great loss on account of defendants' actions including the value of said property and home and all manner of mental and emotional pain and suffering and loss of consortium and inconvenience and

interference with their family relationships and loss of time and money.

6. Defendants have repeatedly added illegal charges to taxes owed on what remains of plaintiffs' property and threaten to sell same for back taxes including said illegal charges, whereas they should disgorge themselves of said illegal charges and offset all legal taxes against what defendants owe plaintiffs.

Wherefore plaintiffs each pray for redress in full to them for the aforesaid deprivation of their rights, such compensatory damages above $10,000.00 as shall compensate them for their losses including ordinary and penalty interest and reasonable actual attorneys fees and cost, such exemplary and/or punitive damages as they deserve to make defendants smart for their wrongdoing and serve as an example to others; and such equitable relief as the court deems just to check

defendants' wrongdoing including mandatory or prohibitory injunctions as needed to restore plaintiffs to their status quo prior to defendants' wrongful actions and to prevent the sale of what remains of plaintiffs' property for back taxes.

COUNT II

7. Paragraph 1 of Count I is incorporated by reference into this Count II and made paragraph 7 hereof.

8. Paragraph 2 of Count I is incorporated by reference into this Count II and made paragraph 8 hereof.

9. Paragraph 3 of Count I is incorporated by reference into this Count II and make paragraph 9 hereof.

10. Paragraph 4 of Count I is incorporated by reference into this Count II and made paragraph 10 hereof.

11. Paragraph 5 of Count I is incorporated by reference into this Count II and made paragraph 11 hereof.

12. Paragraph 6 of Count I is incorporated by reference into this Count II and made paragraph 12 hereof.

13. Defendants conduct was intentional and outrageous and calculated to inflict severe mental and emotional pain and suffering and mental anguish and stress upon plaintiffs and to cause them great harm and losses including their home their relations with each other, family and community.

Wherefore, the prayer of Count I is incorporated by reference into this Count II and made the prayer hereof to which plaintiffs add a further prayer for damages for defendants' intentional infliction of mental and emotional injury upon them.

COUNT III

14. Paragraph 1 of Count I is incorporated by reference into this Count III and made paragraph 14 hereof.

15. Paragraph 2 of Count I is incorporated by reference into this Count III and made paragraph 15 hereof.

16. Paragraph 3 of Count I is incorporated by reference into this Count III and made paragraph 16 hereof.

17. Paragraph 4 of Count I is incorporated by reference into this Count III and made paragraph 17 hereof.

18. Paragraph 5 of Count I is incorporated by reference into this Count III and made paragraph 18 hereof.

19. Paragraph 6 of Count I is incorporated by reference into this Count III and made paragraph 19 hereof.

20. Defendants have acted under color of law and/or in combination or conspiracy in violation of 42 USC 1983 and 1985 as aforesaid with the intention of inflicting upon plaintiffs manifold injuries and losses including the taking of their real property and home for a

public purpose without due process of law and without payment of just compensation.

Wherefore, the prayer of Count I is incorporated by reference into this Count III and made the prayer hereof to which plaintiffs add a further prayer for damages for defendants' intentional violations of the federal Civil Rights Act together with bonus attorneys fees under Civil Rights Attorneys Fees Act for the prosecution of the instant action.

Dated this 6th day of August A.D. 1984.

Respectfully submitted,

William L. Fisher, Esq.
Attorney for plaintiffs

(2)

No. 90-1496

FILED
APR 29 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

DONALD STEEG and IRENE STEEG,
his wife,
Petitioners,

v.

CITY OF DEARBORN HEIGHTS, JAMES R. BRIGGS,
and LOUIS DOLLIAN,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

CUMMINGS, MCCLOREY, DAVIS & ACHO, P.C.
By: MARCIA L. HOWE (P-37518)
Counsel of Record
33900 Schoolcraft
Livonia, Michigan 48150-1392
(313) 261-2400

Attorneys for Respondents

Interstate Brief & Record Company, *a division of* North American Graphics, Inc.
1629 West Lafayette Boulevard, Detroit, MI 48216 (313) 962-6230

BEST AVAILABLE COPY

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE TRIAL COURT PROPERLY ENTERED A JUDGMENT NOTWITHSTANDING THE VERDICT FOR THE DEFENDANTS WHERE THE PLAINTIFFS FAILED TO PRESENT SUFFICIENT EVIDENCE TO ESTABLISH A CONSTITUTIONAL VIOLATION PURSUANT TO 42 USC 1983 WHERE THE PLAINTIFFS WERE MORE THAN ADEQUATELY PROVIDED WITH DUE PROCESS PRIOR TO THE DEMOLITION OF THEIR PROPERTY?

II.

WHETHER THE TRIAL COURT CORRECTLY GRANTED DEFENDANTS' MOTION FOR SUMMARY DISPOSITION ON PLAINTIFFS' CLAIM ALLEGING INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS WHERE THE PLAINTIFFS WERE UNABLE TO ALLEGE OR SUPPORT CLAIMS OF OUTRAGEOUS CONDUCT AGAINST THE DEFENDANTS AND WHERE ANY SUCH CLAIM IS BARRED BY THE GOVERNMENTAL IMMUNITY DOCTRINE?

III.

WHETHER THE TRIAL COURT CORRECTLY GRANTED DEFENDANTS' MOTION FOR DIRECTED VERDICT WHERE PLAINTIFFS HAVE FAILED TO PRESENT SUFFICIENT EVIDENCE TO ESTABLISH A *PRIMA FACIE* CASE OF INVERSE CONDEMNATION?

IV.

WHETHER, ALTERNATIVELY, THIS COURT SHOULD REVERSE THAT PORTION OF THE APPELLATE DECISION ENUNCIATING THE PROPOSITION THAT PLAINTIFFS NEED NOT SEEK REDRESS IN ADMINISTRATIVE/STATE PROCEEDINGS AS A PREREQUISITE TO SEEKING DAMAGES?

TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

ORDERS AND OPINIONS BELOW 1

JURISDICTION 2

COUNTER-STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 10

ARGUMENTS:

I. THE TRIAL COURT PROPERLY ENTERED A JUDGMENT NOTWITHSTANDING THE VERDICT FOR THE DEFENDANTS WHERE THE PLAINTIFFS FAILED TO PRESENT SUFFICIENT EVIDENCE TO ESTABLISH A CONSTITUTIONAL VIOLATION PURSUANT TO 42 USC 1983 WHERE THE PLAINTIFFS WERE MORE THAN ADEQUATELY PROVIDED WITH DUE PROCESS PRIOR TO THE DEMOLITION OF THEIR PROPERTY. 11

II. THE TRIAL COURT CORRECTLY GRANTED DEFENDANTS' MOTION FOR SUMMARY DISPOSITION ON PLAINTIFFS' CLAIM ALLEGING INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS WHERE THE PLAINTIFFS WERE UNABLE TO ALLEGE OR SUPPORT CLAIMS OF OUTRAGEOUS CONDUCT AGAINST THE DEFENDANTS AND WHERE ANY SUCH CLAIM IS BARRED BY THE GOVERNMENTAL IMMUNITY DOCTRINE. 16

III. THE TRIAL COURT CORRECTLY GRANTED DEFENDANTS' MOTION FOR DIRECTED VERDICT WHERE PLAINTIFFS HAVE FAILED TO PRESENT SUFFICIENT EVIDENCE TO ESTAB-

Page

LISH A *PRIMA FACIE* CASE OF INVERSE CONDEMNATION. 18

IV. ALTERNATIVELY, THIS COURT COULD REVERSE THAT PORTION OF THE APPELLATE DECISION ENUNCIATING THE PROPOSITION THAT PLAINTIFFS NEED NOT SEEK REDRESS IN ĀDMINISTRATIVE/STATE PROCEEDINGS AS A PREREQUISITE TO SEEKING DAMAGES. 23

CONCLUSION 25

RELIEF REQUESTED 26

TABLE OF AUTHORITIES

STATE CASES:

Blue Water Isles Co v. *DNR*, 171 Mich. App. 526; 431 N.W.2d 53 (1988) 21

Boatman v. *Motorists Mutual*, 158 Mich. App. 431; 404 N.W.2d 261 (1987) 18

Ealey v. *Detroit*, 144 Mich. App. 324; 375 N.W.2d 435 (1975) 15

Electro-Tech v. *Campbell Co*, 433 Mich. 57; 445 N.W.2d 61 (1989) 23, 24

Gackler Land Co, Inc v. *Yankee Springs Twp*, 188 Mich. App. 1; 859 N.W.2d 226 (1984), aff'd, 427 Mich. 526; 398 N.W.2d 898 (1986) 20

Guider v. *Smith*, 431 Mich. 559; 431 N.W.2d 810 (1988) ... 15

Hart v. *City of Detroit*, 417 Mich. 488; 331 N.W.2d 438 (1982) 21

In Re Crawford Estate, 115 Mich. App. 19; 320 N.W.2d 276 (1982) 22

Page

Kirk v. *Twp of Tyrone*, 398 Mich. 429; 247 N.W.2d 848 (1976) 19-20

Kougoulas v. *Sorlas*, 252 Mich. 557; 233 N.W.2d 414 (1930) 19

National Boatland, Inc. v. *Farmington Hills Zoning Board of Appeals*, 146 Mich. App. 380; 380 N.W.2d 472 (1985) 20

Nawrocki v. *Superior Court of Grand Rapids*, 8 Mich. App. 228; 154 N.W.2d 47 (1967) 19

Palmer v. *Superior Twp*, 406 Mich. 137; 277 N.W.2d 475 (1975) 20

Peterson v. *City of Lapeer*, 106 Mich. App. 148; 307 N.W.2d 744 (1981) 21

Reibel v. *City of Birmingham*, 23 Mich. App. 732; 179 N.W.2d 243 (1970) 20

Smith v. *Dep't of Mental Health*, 428 Mich. 540; 410 N.W.2d 749 (1987) 17

Troy Campus v. *City of Troy*, 132 Mich. App. 441; 349 N.W.2d 177 (1984) 20

White Lake Twp v. *Amos*, 371 Mich. 693; 124 N.W.2d 803 (1968) 20

FEDERAL CASES:

Chiplen Enterprises, Inc v. *City of Lebanon*, 712 F.2d 1524 (1st Cir. 1983) 13

City of East Lake v. *Forest City Enterprises, Inc*, 426 U.S. 668, 96 S.Ct. 2358; 49 L.Ed.2d 132 (1976) 20

Corder v. *City of Sherwood*, 579 F.Supp. 1042 (E.D. Ark. 1984) 12-13

Harlow v. *Fitzgerald*, 457 U.S. 800; 102 S.Ct. 2727; 73 L.Ed.2d 396 (1982) 15

Page

Harrison v. Springdale Water and Sewer Corp, 780 F.2d 1422 (C.A. 8th 1986) 16

Hudson v. Palmer, 468 U.S. 517; 104 S.Ct 3194; 82 L.Ed.2d 393 (1984) 12

Monell v. Dep't of Social Services, 436 U.S. 658; 98 S.Ct. 2018; 56 L.Ed.2d 611 (1978) 15

Oklahoma City v. Tuttle, 471 U.S. 808; 105 S.Ct. 2427; 85 L.Ed.2d 791 (1985) 15

Parratt v. Taylor, 451 U.S. 527; 101 S.Ct. 1908; 68 L.Ed.2d 420 (1981) 11, 12

Pastan v. City of Melrose, 601 FSupp. 210 (D.C. Mass. 1985) 13

Patsy v. Florida Bd. of Regents, 457 U.S. 496, 550; 102 S.Ct. 255; 73 L.Ed 172 (1982) 23

Quinn v. Bryson, 739 F.2d 8 (1st Cir. 1984) 13

Vicory v. Walton, 721 F.2d 1062 (6th Cir. 1984) 13

Williamson Co Regional Planning Comm v. Hamilton Bank of Johnson City, 473 U.S. 172; 105 S.Ct. 3108; 87 L.Ed.2d 126 (1985) 23

STATUTES:

M.C.L.A. 25.585(3); M.S.A. 5.2935(1) 19

M.C.L.A. 125.585(11); M.S.A. 5.2935(6) 19

M.C.L.A. 125.585(12); M.S.A. 5.2935(7) 19

M.C.L.A. 691.1401 *et seq.*; M.S.A. 3.996(101) *et seq.* .. 18

No. 90-1496

In The

Supreme Court of the United States

October Term, 1990

DONALD STEEG and IRENE STEEG,
his wife,
Petitioners,

v.

CITY OF DEARBORN HEIGHTS, JAMES R. BRIGGS,
and LOUIS DOLLIAN,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

Respondents, CITY OF DEARBORN HEIGHTS, JAMES R. BRIGGS and LOUIS DOLLIAN, request that this Honorable Court deny Petitioners', DONALD STEEG and IRENE STEEG, Request for a Writ of Certiorari to review the Order of the Michigan Supreme Court entered on December 26, 1990, which denied Plaintiffs' Application for Leave to Appeal. Respondents received the Petitioners' Petition for Writ of Certiorari on March 19, 1991. The Petition was docketed at the United States Supreme Court on April 1, 1991.

ORDERS AND OPINIONS BELOW

Respondents rely on the Orders and Opinions submitted in Petitioners' Petition for Writ of Certiorari and its Appendices.

JURISDICTION

This case involves only *one federal* civil rights action brought pursuant to 42 U.S.C. 1983 asserting a due process violation under the 14th Amendment as a result of the demolition of the Petitioners' property. At the trial level, the Plaintiffs also attempted to plead state claims of condemnation, inverse condemnation, and intentional infliction of emotional distress.

The Plaintiffs did not challenge the proceedings below based upon the 5th and 7th Amendments, but focused the matter at trial on 42 U.S.C. 1983 allegedly arising out of the 14th Amendment due process claim.

The Plaintiffs' jury verdict was set aside by the trial court in the Order Granting Defendants' Motion for a Judgment Notwithstanding the Verdict. The state claims had been dismissed by dispositive motions filed and granted prior to the conclusion of trial.

The Michigan Court of Appeals entered an opinion affirming the trial court's decision. Plaintiffs unsuccessfully sought leave to the Michigan Supreme Court.

COUNTER-STATEMENT OF THE CASE

The Plaintiffs/Petitioners have clearly misstated the facts that have occurred in this case and for that reason, Defendants/Respondents request this Court's patience in permitting the Respondents to set forth those facts that became apparent during the trial.

In 1964, DONALD STEEG, at that time a single man, purchased a parcel of residential property on Beech Daly Road in Dearborn Heights. He subsequently married Irene Steeg. They lived in the house on Beech Daly until 1971. At that time, the Petitioners purchased another home and began

utilizing the home on Beech Daly as an income-producing duplex. The occupancy of the Beech Daly property as a residence was a nonconforming use.

The sequence of events with respect to the Beech Daly property was well documented in the exhibits submitted at trial. Officer Louis Dollian, a City Ordinance Officer, was in charge of writing most of the violations for the building department and checking all vacant houses. His superior was Mr. Briggs, the Director of the Building Department. He also reported to another boss in the Police Department.

Respondent DOLLIAN's first contact was a result of a complaint. At that time, the Officer warned the Petitioners that the Building Department's records showed the Petitioners failed to obtain a Certificate of Occupancy, ("C of O"). Ordinance 8.668 required that every home obtain a Certificate of Occupancy. After the warning was not heeded, Petitioners were issued a ticket on June 19, 1981 for failure to obtain a "C of O." A hearing on the ticket was scheduled for September.

Later in June, 1981, the Petitioners requested that the City perform inspections at Petitioners' expense for the purpose of obtaining a "C of O," or for the purpose of bringing the premises up to code for resale. Although a dozen or so violations of the building code were cited against the property, Mr. Steeg estimated that the actual cost of the materials would amount to only $300.00. In response, Mr. Steeg pulled a plumbing and electrical permit. Mr. Steeg, however, failed to notice on these reports that his property was being utilized as a non-conforming use. The property was zoned light commercial, but Petitioners were renting the premises for residential purposes.

The day before the hearing, complaints were received from citizens with regard to the numerous trailers which

the tenants had parked on the premises. The complaints with respect to the use of the property by the tenants became moot when the Plaintiffs were found in violation of the ordinance requiring a "C of O" on September 24, 1981 and the state district court judge ordered eviction. Ordinance 8.613 reads as follows:

> 8.613. *Notice of Violation*. Whenever the Building Inspector determines that there exists a violation of any provision of this Code or of any rule or regulation adopted pursuant thereto, he shall give notice of such violation to the person or persons responsible therefor and order compliance. Such notice and order shall:
>
> 1). Be in writing.
>
> 2). Include a list of violations referring to the sections of the Code violated.
>
> 3). Contain an outline of remedial action which, if taken will effect compliance with the provisions of this Code.
>
> 4). Set a reasonable time, not to exceed 90 days in any event, for compliance.
>
> 5). Advise the owner or occupant of the procedure for appeal.
>
> 6). Be served upon the owner, his agent, or the operator, or occupant by delivering the same at his residence, office or place of business with some person of suitable age and discretion who shall be informed of the contents thereof, or by mailing a copy thereof by certified mail to his last known address, or if the person to be served is unknown, by positing said notice in some conspicuous place on the premises.

> 7). If necessary, and anything herein to the contrary notwithstanding, also require the dwelling or portion thereof to be vacated forthwith and not reoccupied until the required repairs and improvements are completed, inspected and approved by the Building Inspector.
>
> * * *
>
> The Ordinance, 8.668, provides that if a house is sold, occupied, reoccupied or purchased, the house must be recertified.

Mr. Steeg pled guilty and did not appeal the conviction for failure to have a "C of O." He alleged that he did not understand his rights for appeal of his plea. He never obtained an attorney because he did not feel it was a serious problem.

Mr. Steeg failed to notice that the Inspection Reports listed his property as being zoned commercial and further, that the current use was non-conforming. He never inquired into zoning. Mr. Steeg made no request for a re-inspection. Although Mr. Steeg did speak with the Building Inspectors, he did not make any great attempts to bring the house up to code.

In June, 1982, approximately one year after the issuance of the ticket for failure to have a "C of O," Plaintiff alleged that Defendant Officer Dollian prohibited the Plaintiff from working on the house. The Plaintiff believed he was informed that his house was "red tagged," although he has no written documentation of this occurrence.

Defendant Officer Dollian testified that he did not tell the Plaintiff in June of 1982 that he could not work on the house. Officer Dollian did not recall seeing the Plaintiff after the 1981 hearing. In 1983, however, he had written a

ticket for the Steegs' failure to cut the grass.[1] Officer Dollian testified that it would not be his job to inform the Plaintiff he could not work on the house. The officer testified that he did not recall a request for a ticket by Mr. Bedwell and that the City files do not reflect any issuance of a stop work order.

The Steegs admit learning of the non-conforming use status of the home by Mr. Briggs in either June of 1982, or in the fall of 1982. On October 13, 1982, a letter was written from the Building Department to the Plaintiff informing him that his non-conforming use was forfeited. Mr. Briggs also testified that he had never informed the Plaintiff that he could not fix up his house. The Plaintiff was ordered to stop tearing out the floor because he had not obtained the requisite permit. Apparently, a stop work order was issued by a field inspector, but Mr. Briggs does not recall any more than that.

On November 12, 1982, an Investigation Report was presented to Defendant Briggs. Defendant Officer Dollian indicated in his report that the home on Beech Daly was vacant, left wide-open, and being utilized by kids. It constituted a safety hazard.

In response to the letter informing them of their loss of the non-conforming use, the Plaintiffs sought a hearing in front of the Zoning Board of Appeals in April, 1983. The Plaintiffs actually attended a hearing in front of the Zoning Board of Appeals in May, 1983. The entire Board was present, Mr. Steeg testified, and the Board was permitted to ask questions. At the hearing, there was a Motion by the Zoning Board of Appeals to allow the Plaintiffs to revert

---

[1] Just as the officer had finished writing the ticket, the Plaintiff, DONALD STEEG, arrived to cut the grass. (*Id*). Although the officer was unable to dismiss the ticket because of the department policy to prevent ticket fixing, he did note on the ticket that the Plaintiff arrived to cut the grass. As a result, the ticket was dismissed. (*Id*).

to the non-conforming use for a period of six months. Although the Plaintiffs requested an additional period of only two weeks, the Board would only vote on a period of six months. The Plaintiffs were not successful and the Zoning Board of Appeals denied their request for the variance.

At that hearing, Defendant Briggs, Director of the Building Department, testified that no major infractions on the house were apparent, the house was solid and sound, and the infractions could be easily repaired. Despite the support by the Building Department, the Zoning Board of Appeals denied Plaintiffs' request. The Building Department encouraged and informed Plaintiffs of their right to appeal.

Although the Plaintiffs initiated an appeal of that decision, the Plaintiffs abandoned their appeal. Not comprehending the appeal procedure time requirements, Mr. Steeg testified that the instant civil action could be characterized as his appeal of the Zoning Board of Appeals' decision.

With regard to the ordinances on non-conforming uses, Defendant Briggs testified that the continual maintenance of a non-conforming use permits its perpetuation. Conversely, if the house is abandoned or vacant, the ordinances provide that the person loses the non-conforming use.

The ordinances also provide for the removal or surrendering of a non-conforming use by the City. Zoning Ordinance 5.776 permits the acquiring of property by the City after the loss of a non-conforming use. The City, however, has never used that particular section to acquire and then condemn non-conforming uses.

The pertinent Zoning Ordinance No. 5.73, pertains to discontinuance or abandonment of a non-conforming use and reads as follows:

> 5.73. *Discontinuance or Abandonment.* Any nonconforming use of land or building which has become vacant or remains unoccupied owing to abandonment or discontinuance for a period of six (6) months shall thereafter conform to the provisions of this chapter.

Despite the ordinance requiring that the failure to obtain a "C of O" within thirty days forfeits the non-conforming use, Mr. Briggs testified that the Building Department would not stringently enforce that provision as a matter of policy.

Zoning Ordinance 5.66(a) reads as follows:

> 5.66. *Certificate of Occupancy.*
>
> (a) At any time after the adoption of this Chapter should the City become aware of a nonconforming use, the owner of said nonconforming use shall be notified by the Building Inspector of the provisions of this section that his property constitutes a nonconforming use. Within thirty (30) days after receipt of said notice, the owner shall apply for and be issued a Certificate of Occupancy for the nonconforming use. The application of such Certificate shall designate the location, nature, and extent of the nonconforming use and such other details as may be necessary for the issuance of the Certificate of Occupancy.
>
> If the owner of a nonconforming use fails to apply for a Certificate of Occupancy within thirty (30) days after receipt of the foregoing notice, the use ceases to be nonconforming and is hereby declared to be in violation of this chapter. The Building Inspector and the

City Attorney shall take appropriate action to enjoin such violation.

Mr. Briggs testified that the City stringently enforced Ordinance 5.73 regarding the discontinuance or abandonment of the property. Mr. Briggs indicated he would consider a house vacant for six months if there was no furniture in the house, the house was not being utilized, mail would not come to the house and there was no activity indicating that an individual was residing there. Mr. Briggs testified that the forfeiture of a non-conforming use occurs automatically under the six month provision and is not a true question of enforcement. Mr. Briggs testified that the house was deemed vacant as of December 29, 1982.

Upon cross-examination, Mr. Briggs testified that in December of 1981, the file indicated that little kids were found to be playing in the house repeatedly and vandalism was occurring. In May, 1983, a fire occurred at the premises. As a result of the deterioration, the Plaintiffs received a Notice of Condemnation issued by the City of Dearborn Heights on June 29, 1983. That notice provided that the demolition would occur within thirty days of the notice unless, pursuant to Section 8.615, the Plaintiffs would file a written petition requesting a hearing within ten days of the notice accompanied by a $75.00 fee. Mr. Steeg filed an application, but withdrew it. The City refunded his $75.00 check.

The Plaintiffs took no further action. On November 4, 1983, a letter was sent to the Plaintiffs and their attorney from the Defendants to inform Plaintiffs that the property would be demolished unless something was done to restrain the City from doing so. The Plaintiffs took no action and on December 9, 1983, five months after the initial notice of condemnation, the house was demolished. Mr. Briggs testified that the policy for enforcing the ordinances for demolition was a lenient one

in 1981 through 1983 because of the status of the economy making it hard to sell a house and hard to obtain a mortgage. In actuality, Plaintiffs were granted a reprieve of a few years by the City within which to comply with the ordinance or seek relief at a higher court.

Plaintiffs filed the instant action in state court which resulted in a verdict in Plaintiffs' favor on the 42 U.S.C. 1983 claim. The jury awarded Plaintiffs $50,000.00 against the City and $50,000.00 against Defendant BRIGGS. The trial court granted Defendants' Motion for Judgment Notwithstanding the Verdict on the 42 U.S.C. 1983 claim. The trial court also granted Defendants' dispositive motions on the remaining claims prior to trial.

SUMMARY OF THE ARGUMENT

The trial court properly concluded that the Plaintiff did not state or support a claim under 42 U.S.C. 1983 for deprivation of property without due process under the 14th Amendment. First, the Plaintiff had adequate state remedies that were available and were in fact utilized in this case. Secondly, due process had not been violated because the process was adequate and appropriately followed in the instant case. For that reason, the Plaintiffs' federal claim was completely without merit and the trial court properly granted Defendants' Motion for a Judgment Notwithstanding the Verdict. Additionally, the remaining state claims that were filed by the Plaintiff were adjudicated in the state court and are not properly within the jurisdiction of this Court. Alternatively, those claims are also without merit.

ARGUMENTS

I.

THE TRIAL COURT PROPERLY ENTERED A JUDGMENT NOTWITHSTANDING THE VERDICT FOR THE DEFENDANTS WHERE THE PLAINTIFFS FAILED TO PRESENT SUFFICIENT EVIDENCE TO ESTABLISH A CONSTITUTIONAL VIOLATION PURSUANT TO 42 U.S.C. 1983 WHERE THE PLAINTIFFS WERE MORE THAN ADEQUATELY PROVIDED WITH DUE PROCESS PRIOR TO THE DEMOLITION OF THEIR PROPERTY.

This Court in *Parratt* v. *Taylor*, 451 U.S. 527; 101 S.Ct. 1908; 68 L.Ed.2d 420 (1981) addressed the necessary elements for maintaining such an action under 42 U.S.C. § 1983. In that case, the plaintiff brought an action under § 1983 for the loss of mail order hobby materials by prison officials. The plaintiff claimed that the loss gave rise to a § 1983 action for depriving him of property without due process of law. In finding that the plaintiff had not stated or proven a cause of action under 42 U.S.C. § 1983, the Court stated:

> Our inquiry therefore must focus on whether respondent has suffered a deprivation of property without due process of law. In particular, we must decide whether the tort remedies which the State of Nebraska provides is a means of redress for property deprivation to satisfy the requirements of procedural due process.
>
> * * *
>
> Although the state remedies may not provide the respondent with all of the relief which may have been available if he had proceeded under Section 1983, that does not mean the state remedies are not adequate to satisfy the requirements of due process.

> The remedies provided could have fully compensated the respondent for the property loss he suffered, and we hold they are sufficient to satisfy the requirements of due process. 451 U.S. 537; 68 L.Ed.2d 430, 434.

The principle of *Parratt* was extended in *Hudson* v. *Palmer*, 468 U.S. 517; 104 S.Ct 3194; 82 L.Ed.2d 393 (1984). In *Hudson*, the plaintiff alleged that he was deprived of his property by prison officials who had intentionally destroyed some of his personal property during the search of his cell. This Court decided that the plaintiff had failed to state a claim under § 1983 and extended the principle of *Parratt* as follows:

> We hold that an unauthorized intentional deprivation of property by a state employe does not constitute a violation of the procedural requirements of the due process clause of the fourteenth Amendment if a meaningful post-deprivation remedy for loss is available. 82 L.Ed.2d at 407.

In *Corder* v. *City of Sherwood*, 579 F.Supp. 1042 (E.D. Ark. 1984), the plaintiff sued the city under 42 U.S.C. § 1983 alleging the defendant city's refusal to issue building permits resulted in a violation of the plaintiff's constitutional rights under the Fourteenth Amendment. In finding that the plaintiffs had failed to state a claim under § 1983, the Court stated:

> Under Arkansas law, the chancery courts have the power to review zoning decisions and grant relief when a zoning decision is arbitrary, capricious, or unreasonable. An appeal from an adverse decision could be pursued through the Arkansas state court system. Therefore, the plaintiff's right to judicial review of a city councils' decision by state courts afford them protection from arbitrary, capricious, or

> unreasonable action and therefore affords them due process, as well as equal protection. 579 F.Supp at 1044.

In *Chiplen Enterprises, Inc* v. *City of Lebanon*, 712 F.2d 1524 (1st Cir. 1983), a real estate developer brought suit against the city under 42 U.S.C. § 1983 alleging a violation of constitutional rights. The city denied the plaintiff a building permit, and only issued that building permit some five years after the original application and after plaintiff had been to the Supreme Court of New Hampshire. The gravamen of plaintiff's complaint was that the defendant denied the plaintiff due process by maliciously denying plaintiff a building permit for invalid and illegal reasons and in bad faith. In holding that the plaintiff had failed to plead or prove a claim under § 1983, the Court stated as follows:

> A mere bad faith refusal to follow state law in such local administrative matters simply does not amount to a deprivation of due process where the state courts are available to correct the error. 712 F.2d 1528.

This same rule is followed in *Quinn* v. *Bryson*, 739 F.2d 8 (1st Cir. 1984); and *Pastan* v. *City of Melrose*, 601 F.Supp. 210 (D.C. Mass. 1985).

Further, cases have held that in 42 U.S.C. 1983 damage suits, the plaintiff has the burden of pleading and proving the inadequacy of state remedies. *Vicory* v. *Walton*, 721 F.2d 1062 (6th Cir. 1984).

In the instant case, there was no evidence presented that the Defendants' actions were improper in anyway. The Defendants had no interest in obtaining Plaintiffs' property, but merely enforced the City's ordinances. The evidence overwhelmingly established that the Plaintiffs failed to take any action available to them to remedy their circumstances.

Once the Defendants issued the citation, Plaintiffs had the obligation to assert their opposition or take action at the district court. Plaintiffs did absolutely nothing to protect their interests. The conviction and the eviction were carried out by the district court and its agents, who are not parties to this action.

Furthermore, the Defendants put Plaintiffs on notice of the loss of the non-conforming use. The Plaintiffs objected and appealed to the Zoning Board of Appeals. The Zoning Board of Appeals, a separate body that is not a named defendant, was the entity that denied Plaintiffs' request for a variance. With respect to the demolition, the Plaintiffs abandoned their objections of the demolition.

The finding of a violation of the Petitioners' civil rights in the instant case, where there was no genuine issue of fact, would result in a similar claim for any resident whenever an entity enforced its zoning or building ordinances. Petitioners were not deprived of all reasonable use of their property. The Petitioners have failed to cite authority for their assertions that they have an unrestricted constitutional right to repair their property. In fact, the Petitioners were never prevented from working on their house after they obtained the correct permits. Petitioner failed to establish that the City or its employees failed to provide the Petitioner with notice of their evaluations and notice of ways to appeal those matters. The municipal employees provided the Petitioners with every opportunity and encouraged the utilization of these opportunities to avoid the consequences that ultimately occurred. The City employees delayed their actions to give Petitioners as much time as possible. Evidence clearly established that the procedures followed by the Respondents were proper.

The Petitioners, who conceded that the ordinances were valid, were merely attacking the allegedly arbitrary decision of Respondent Briggs that Petitioners had abandoned the

non-conforming use. The law providing for a claim against the entity under 42 U.S.C. 1983 clearly prohibits the theory of *respondeat superior* liability. *Monell* v. *Dep't of Social Services*, 436 U.S. 658; 98 S.Ct. 2018; 56 L.Ed.2d 611 (1978). The Petitioners must establish that the entity has an unconstitutional policy, practice or custom. Evidence of a single incident is insufficient to constitute a policy. *Oklahoma City* v. *Tuttle*, 471 U.S. 808; 105 S.Ct. 2427; 85 L.Ed.2d 791 (1985).

In the instant case, the verdict against the City cannot stand. It attempts to impose upon the City's vicarious liability for Briggs' actions. Such a finding is in direct contravention to *Monell*, *supra*. Moreover, Petitioners failed to establish any unconstitutional policy. Since Petitioners have relied on this one instance, their claim must fail.

Additionally, Respondent Briggs himself is entitled to qualified immunity. The question is one of law and the evidence overwhelmingly established that Respondent Briggs reasonably believed his actions were lawful and appropriate and that he took every opportunity possible to assist the Plaintiffs. *Guider* v. *Smith*, 431 Mich. 559; 431 N.W.2d 810 (1988). See also *Harlow* v. *Fitzgerald*, 457 U.S. 800; 102 S.Ct. 2727; 73 L.Ed.2d 396 (1982).

The trial court could have set aside the jury verdict as to Defendant Director Briggs on an alternative basis. The jury found that the Defendant Officer Dollian, who issued the citations, was not liable to the Plaintiffs. Where Defendant Briggs' contact with the Plaintiff was based on the same activity as that of Defendant Officer Dollian's, the verdict, with respect to Officer Dollian, is inconsistent with the verdict as to Defendant Briggs. The verdict against Defendant Briggs should be reversed on that basis. *Ealey* v. *Detroit*, 144 Mich. App. 324; 375 N.W.2d 435 (1975).

Furthermore, the Petitioners' argument for the imposition of such liability is not persuasive. They fail to cite authority in support of their position. At the lower courts,

the Petitioners relied on *Harrison* v. *Springdale Water and Sewer Corp*, 780 F.2d 1422 (C.A. 8th 1986). There, the Court concluded that the plaintiffs had stated a claim for a violation of civil rights where the plaintiffs alleged that their First Amendment right to access of the Courts was violated where they sought judicial intervention to preclude the pollution of their property by the city's sewage department. In retaliation, the city's employees harassed the plaintiffs with a counter-claim for condemnation. The city employees admitted that the counter-claim was filed only to pressure the plaintiffs into settlement and that the city was not interested in acquiring plaintiffs' property.

The Court in *Harrison* found that plaintiffs' substantive rights under the First Amendment were allegedly violated independent of a due process claim. Thus, the state remedy analysis was not at issue in *Harrison*.

In the instant case, the trial court properly granted Defendants' motion, as a matter of law, where the Plaintiffs failed to establish any evidence of a due process violation. The evidence established that a taking did not occur and the Plaintiffs conceded that the ordinances were constitutional. The evidence clearly established that the ordinances were constitutionally applied and that the Plaintiffs had adequate state remedies, ample notice, and more than adequate time to prevent the damage.

II.

THE TRIAL COURT CORRECTLY GRANTED DEFENDANTS' MOTION FOR SUMMARY DISPOSITION ON PLAINTIFFS' CLAIM ALLEGING INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS WHERE THE PLAINTIFFS WERE UNABLE TO ALLEGE OR SUPPORT CLAIMS OF OUTRAGEOUS CONDUCT AGAINST THE DEFENDANTS AND WHERE ANY SUCH CLAIM IS BARRED BY THE GOVERNMENTAL IMMUNITY DOCTRINE.

Respondents assert that this claim is a state claim and therefore should not be addressed by this Court. Alterna-

tively, Respondents assert that the Petitioners failed to establish a claim for intentional infliction of emotional distress.

The tort of intentional infliction of emotional distress is established if the plaintiff can plead or support the following:

(1) Extreme and outrageous conduct;

(2) Intent or recklessness;

(3) Causation; and

(4) Severe emotional distress. *Roberts* v. *Auto-Owners Ins Co*, 422 Mich. 594, 597; 374 N.W.2d 905 (1985).

First, Plaintiffs were unable to support or allege facts that would constitute "extreme and outrageous behavior" by any Defendant herein. The testimony established that the actions of the individual employees consisted of the performance of their properly executed professional duties. The Defendant Officer merely issued citations and Defendant Director decided that the violations were based on sufficient facts while the district court judge determined that the violations occurred. Plaintiffs failed to allege or support facts evidencing any tortious conduct independent of the execution of Defendants' duties.

No evidence was presented to support a claim that the Defendant City's enforcement of its ordinances would constitute a claim for intentional infliction of emotional distress. The Defendant City is not directly or vicariously liable for the alleged torts of its employees. *Smith* v. *Dep't of Mental Health*, 428 Mich. 540; 410 N.W.2d 749 (1987). With regard to the individual Defendants, the Plaintiffs failed to establish any evidence of behavior that could be characterized as "extreme and outrageous".

Therefore, the trial court properly dismissed Plaintiffs' claim for intentional infliction of emotional distress where

the Plaintiffs' claim is based upon the dissatisfaction with the Defendants' performance of their legal and professional duties. To hold otherwise would permit residents of every entity to bring such a claim whenever they merely disagree with the outcome of their interactions with their local government. Plaintiffs were unable to allege or support facts constituting extreme or outrageous behavior by the Defendants.[2]

III.

THE TRIAL COURT CORRECTLY GRANTED DEFENDANTS' MOTION FOR DIRECTED VERDICT WHERE PLAINTIFFS HAVE FAILED TO PRESENT SUFFICIENT EVIDENCE TO ESTABLISH A *PRIMA FACIE* CASE OF INVERSE CONDEMNATION.

Respondents assert that the Petitioners' state claim of inverse condemnation would be barred by *res judicata* and collateral estoppel. *Boatman* v. *Motorists Mutual*, 158 Mich. App. 431; 404 N.W.2d 261 (1987). There, the Court denied the defendant no-fault insurer's motion for summary disposition on the basis that a "starting-gate" was not a motor vehicle and plaintiffs' injuries were not foreseeably identifiable with the normal use of a motor vehicle. The Court would not reopen the issue of entitlement to benefits because that issue was previously decided in a final order not appealed by defendant.

In the instant case, the conviction for the lack of C of O, which was final, may not be attacked collaterally in a civil matter. A final order was entered on the issue of whether a C of O was issued. The question was decided in the negative. Plaintiffs never appealed. *Kougoulas* v. *Sorlas*,

---

[2] Alternatively, any tort claims are barred by governmental immunity. M.C.L.A. 691.1401 *et seq.*; M.S.A. 3.996(101) *et seq.* because Plaintiffs' claim does not fall within one of the statutes' enumerated exceptions to governmental immunity. *Id.*

252 Mich. 557; 233 N.W.2d 414 (1930); *Nawrocki* v. *Superior Court of Grand Rapids*, 8 Mich. App. 228; 154 N.W.2d 47 (1967).

In the instant case, the Plaintiffs admitted that the instant action was, in essence, an appeal of the City's decision with regard to their property. (TT, Vol. II, p. 111, D. Steeg). The Zoning Board of Appeals denied the Plaintiffs' request for a variance and the Plaintiffs did not appeal. (*Id*). The Plaintiffs did not appeal the judgment of September 24, 1981, where Plaintiff, DONALD STEEG, pleaded guilty for failure to have a "C of O" and the Judge ordered the premises vacated. (TT, Vol. III, p. 96, L. Dollian). The Plaintiffs did not appeal the citations issued, the alleged stop-work order for performing work without a permit, the decision and findings of the Zoning Board of Appeals, the condemnation, or the demolition. Therefore, the failure of the Plaintiffs to appeal these final judgments constitutes *res judicata* and collateral estoppel of the propriety of those actions or the effect of these prior proceedings.[3]

Alternatively, the trial court properly granted Defendant's Motion for Directed Verdict on the failure to establish a state claim for inverse condemnation.

The law is clear in the State of Michigan that in order to maintain an action for inverse condemnation, the Petitioners must prove that there remains no reasonable use of the property in its current zoning classification. In *Kirk* v. *Twp. of Tyrone*, 398 Mich. 429; 247 N.W.2d 848 (1976), the Court indicated that the following rule governs proof of the claim of confiscation of property without due process:

---

[3] Alternatively, Defendants argue that the Circuit Court was without jurisdiction to decide questions of appeal or questions that should have been an appeal protesting the loss of the non-conforming use of the demolition of the property. M.C.L.A. 25.585(3); M.S.A. 5.2935(1); M.C.L.A. 125.585(11); M.S.A. 5.2935(6); M.C.L.A. 125.585(12); M.S.A. 5.2935(7).

> In *Kropf* we required the property owner claiming confiscation to prove that application of an existing ordinance to his property "precludes it's use for any purpose to which it is reasonably adapted." 391 Mich. 139, 163; 215 N.W.2d 179, 189. 247 N.W.2d at 854.

In *Reibel* v. *City of Birmingham*, 23 Mich. App. 732; 179 N.W.2d 243, 246 (1970), the Court defined confiscation as follows:

> A zoning restriction deprives the zoned property of any reasonable use and is, therefore, confiscatory if all permitted uses are so devoid of feasibility that the restriction has accomplished the destruction of usable value.

See, also, *Palmer* v. *Superior Twp*, 406 Mich. 137; 277 N.W.2d 475 (1975). Plaintiff must show the zoning classification precludes the use of the property for any purpose for which it is reasonably adapted; *Troy Campus* v. *City of Troy*, 132 Mich. App. 441; 349 N.W.2d 177 (1984). Furthermore, one of the accepted goals of zoning is the eventual elimination of non-conforming uses. *National Boatland, Inc* v. *Farmington Hills Zoning Board of Appeals*, 146 Mich. App. 380; 380 N.W.2d 472 (1985).

It has further been held by the Court that a municipality need not provide every property owner with the "best use" of his property as viewed by that property owner, but only with a reasonable use of that property. *City of East Lake* v. *Forest City Enterprises, Inc*, 426 U.S. 668, 96 S.Ct. 2358; 49 L.Ed.2d 132 (1976). The mere diminution of property value is further insufficient to support a claim of taking of property without just compensation. See *White Lake Twp* v. *Amos*, 371 Mich. 693; 124 N.W.2d 803 (1968); *Gackler Land Co, Inc* v. *Yankee Springs Twp*, 188 Mich. App. 1; 859 N.W.2d 226 (1984), aff'd, 427 Mich. 526; 398 N.W.2d 898

(1986); *Hart* v. *City of Detroit*, 417 Mich. 488; 331 N.W.2d 438 (1982).

At trial, the Plaintiffs did not contest the validity of the ordinances, only their application. (TT, Vol. III, p. 169, Plaintiffs' counsel). On appeal, Plaintiffs asserted that a taking occurred when the Defendant City prohibited the Plaintiffs from performing work without the issuance of a permit. Plaintiffs never challenged the citation prohibiting the performance of work on the premises for failure to obtain the requisite permit. Therefore, in addition to objecting to the newly raised issue not presented below, *Blue Water Isles Co* v. *DNR*, 171 Mich. App. 526; 431 N.W.2d 53 (1988), Defendants also assert that collateral estoppel precludes relitigation of the propriety of the issuance of that citation. *Peterson* v. *City of Lapeer*, 106 Mich. App. 148; 307 N.W.2d 744 (1981).

Furthermore, there was no evidence to establish a "taking" or that the City intended to "take" Plaintiffs' property. Plaintiffs attempted to establish that a City's improvement project was the ulterior motive for the City's actions as reflected by the demolition of two other houses. Plaintiffs' argument was unfounded as evidenced by the uncontroverted testimony that the houses were demolished at the request of the owner after incidents of vandalism and fire. (TT, Vol. III, pp. 92-93, L. Dollian). Furthermore, the houses were located two to three blocks away. There was no evidence presented of any City plan to condemn and obtain the surrounding area for its own purposes. Although Plaintiffs argued that they never knew the zoning of their property and presumed that it was residential, Mr. Steeg admitted that some change from residential to commercial was beginning as early as 1964-1967. (TT, Vol. I, pp. 95-96, D. Steeg).

The evidence clearly established that the Defendant, CITY OF DEARBORN HEIGHTS, and the individual Defend-

ants did not intend to "utilize" Plaintiffs' property and, in fact, attempted to encourage Plaintiffs and their attorney to take action. However, the Plaintiffs abandoned their appeals, applications and acquiesced to the progression of events. There was no evidence presented that Plaintiffs were deprived of all reasonable use of their property by the Defendants.

Additionally, the defense of *laches* is applicable where the Plaintiffs' failure to take action results in prejudice to the Defendants. The Plaintiffs took this action long after the damage was done. Even if these Defendants had the authority to alter events, the Plaintiffs' delay prejudiced the Defendants. The alleged damage could have been stopped or mitigated by Plaintiffs' actions early on. *In Re Crawford Estate*, 115 Mich. App. 19, 25-26; 320 N.W.2d 276 (1982).

Therefore, the Plaintiffs' claim of inverse condemnation is based upon the sequence of events relating to their property as a result of the Defendant City's enforcement of its zoning and building ordinances. The Plaintiffs conceded the validity of the ordinance, but never challenged their enforcement by the appeal process. Therefore, since the Plaintiffs concede the ordinances were valid and since the propriety of the citations remains intact, the Plaintiffs have failed to establish any evidence of misconduct. Permitting a claim under these circumstances completely disrupts the entity's ability to implement its police powers. The only option available to the entity and its employees is to ignore enforcement of the zoning violations. Therefore, the trial court properly granted Defendants' Motion for Directed Verdict where the Plaintiff was unable to establish an unconstitutional taking of its property and the Defendant, CITY OF DEARBORN HEIGHTS, was entitled to judgment as a matter of law.

IV.

ALTERNATIVELY, THIS COURT COULD REVERSE THAT PORTION OF THE APPELLATE DECISION ENUNCIATING THE PROPOSITION THAT PLAINTIFFS NEED NOT SEEK REDRESS IN ADMINISTRATIVE/STATE PROCEEDINGS AS A PREREQUISITE TO SEEKING DAMAGES.

Respondents assert that the following statement by the Court of Appeals subsequent to that portion of the decision is not a correct enunciation of the law in Michigan:

> We note initially that plaintiffs were not required to seek a variance or to appeal the zoning board's decision as a prerequisite to their complaint. The taking claim is separate from the seeking of a variance. *Bevan v. Bradon Twp*, 176 Mich App. 452, 457; 440 N.W.2d 31 (1989). (Opinion, page 5).[4]

In *Electro-Tech v. Campbell Co*, 433 Mich. 57; 445 N.W.2d 61 (1989), Defendants-Appellees assert that the Michigan Supreme Court concluded that there were two elements to the requirement of finality. *Electro-Tech*, 433 Mich. at 81, 87. The first element is that the "plaintiff obtain a final decision regarding the application of the zoning ordinance and subdivision regulation of its property." *Id*, at 81. The Court relied on *Williamson Co Regional Planning Comm v. Hamilton Bank of Johnson City*, 473 U.S. 172; 105 S.Ct. 3108; 87 L.Ed.2d 126 (1985).[5]

Later, notwithstanding its continued reference to *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 550; 102 S.Ct. 255; 73 L.Ed 172 (1982), the Court in *Electro-Tech* relied on the second finality requirement set forth in *Williamson* stating

---

[4] This case is currently on appeal before the Michigan Supreme Court, 176 Mich. App. 452; 440 NW2d 31 (1989), lv. grtd., 434 Mich. 881 (1990).

[5] In *Electro-Tech*, the Court realized that a "taking" claim is different from a 42 U.S.C. 1983 claim. In *Electro-Tech*, the Court concluded the taking claim was not ripe where the plaintiff failed to receive the final decision from the defendant.

that a "taking claim is not ripe until a plaintiff has sought compensation through state procedures." *Electro-Tech*, 433 Mich. at 87. Thus, Respondents assert that the Petitioners must seek redress in the administrative/state remedies before seeking relief pursuant to 42 U.S.C. 1983 or under a state taking claim.

Respondents assert that Petitioners must exhaust their administrative/state remedies prior to seeking damages under either a 1983 claim or a state taking claim. A result to the contrary mandates that the state courts become a zoning board of appeals. Moreover, Petitioners will now be asserting that this super board of zoning is entitled to issue damages whenever they disagree with the planning commission, ZBA, or the building inspector's decision. As a practical matter, this is blatantly unfair to impose liability against an entity when the Petitioners have not proceeded through the complete administrative process. If the planning commission or building inspector denied a permit or a zoning change, this decision may be reversed by subsequent actions on the part of a different department within the City.

A result to the contrary has the state courts entangled in building and zoning problems of local entities with resulting confusion. The imposition of damages when the Courts subsequently disagree with the local boards, commissions, building inspectors, etc. without the necessity of completing the process within the entity subjects local municipalities to horrendous damage awards.

The instant case is a perfect example of the need for the Petitioners to exhaust their administrative/state remedies. The Petitioners in the instant case had ample notice as to every step that the City was going to take. The employees and the City informed the Petitioners and encouraged the Petitioners to proceed forward in some manner in order to avoid the consequences of their inaction. The Petitioners failed to do anything.

Moreover, although the Petitioners brought suit against the "City" and the "building director," Petitioners were attacking the actions of non-parties to the lawsuit. The Petitioners attacked the District Court Judge's Order removing the tenants from the building because of a lack of a certificate of occupancy. The Petitioners attacked the determination that the nonconforming use had been abandoned, but failed to appeal the Board's denial of their variance to give them additional time to bring the building up to code. Moreover, the City, through its building director, gave the Petitioners an exorbitant amount of extra time to cure the problems.

Respondents also assert that these prior proceedings constitute collateral estoppel and *res judicata* on these issues where the Petitioners failed to take subsequent appropriate, appeal action. Thus, Respondents assert that the Petitioners must seek redress in their administrative/state remedies prior to seeking relief at the Courts for damages under either a 42 U.S.C. 1983 or a taking claim. For that reason, Respondents assert that the Court of Appeals was incorrect in concluding on page 5 that seeking a variance or appeal to the zoning board of appeals was not a prerequisite to the filing of the Complaint.

CONCLUSION

The trial court's Order granting summary disposition of Plaintiffs' claim for intentional infliction of emotional distress was proper where Plaintiffs were unable to allege or support evidence of "extreme and outrageous" behavior. Further, Plaintiffs' claim would be barred by the governmental immunity doctrine.

The trial court correctly granted the Defendants' Motion for Directed Verdict of Plaintiffs' claim for inverse condemnation, labeled "Condemnation," where the Plaintiffs were

unable to establish, as a matter of law, that a "taking" occurred because Plaintiffs were not deprived of all reasonable use of their property, but merely attacked the loss of their non-conforming use.

Petitioners' claim for a violation of their civil rights pursuant to 42 U.S.C. 1983 must fail when the evidence established only that the Petitioners were afforded ample notice and opportunity to challenge the actions of the Respondents taken pursuant to the constitutional ordinances that were uncontrovertedly constitutionally applied.

Lastly, Respondents submit that if this Court should grant the Petitioners' Petition for Writ of Certiorari, then the Court should also consider whether the appellate court erroneously concluded that the Petitioners did not need to seek review and exhaust their administrative/state remedies prior to the filing of this action.

RELIEF REQUESTED

Based upon the foregoing the Respondents CITY OF DEARBORN HEIGHTS, JAMES R. BRIGGS and LOUIS DOLLIAN respectfully prays that this Honorable Court deny the Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

CUMMINGS, McCLOREY, DAVIS & ACHO, P.C.

By: /s/ MARCIA L. HOWE (P-37518)
Counsel of Record
33900 Schoolcraft Road
Livonia, Michigan 48150-1392
(313) 261-2400

Attorneys for Respondents

Dated: April 25, 1991